

1 Julie B. Axelrod  
2 California Bar. No. 250165  
3 Immigration Reform Law Institute  
4 25 Massachusetts Ave, NW, Suite 335  
5 Washington, D.C. 20001  
6 Telephone: (202) 232-5590  
7 Fax: (202) 464-3590

8 Lesley Blackner  
9 Admitted *Pro Hac Vice*  
10 Florida Bar No. 654043  
11 340 Royal Poinciana Way, Suite 317-377  
12 Palm Beach, FL 33480  
13 Telephone: (561) 659-5754

14 James P. Miller  
15 California Bar No. 188266  
16 Law Office of JP Miller Jr.  
17 181 Rea Ave, Suite 101  
18 El Cajon, CA 92020  
19 Telephone: (619) 590-0383

20 **THE UNITED STATES DISTRICT COURT**  
21 **SOUTHERN DISTRICT OF CALIFORNIA**

22 WHITEWATER DRAW  
23 NATURAL RESOURCE  
24 CONSERVATION  
25 DISTRICT, *et al.*,

26 Plaintiffs,

27 v.

28 KIRSTJEN NIELSEN, *et al.*,

Defendants.

Case No. 3:16-cv-2583

**PLAINTIFFS' MEMORANDUM  
OF POINTS AND AUTHORITIES  
OPPOSING DEFENDANTS'  
PARTIAL MOTION TO DISMISS  
COUNTS I AND II OF THE  
AMENDED COMPLAINT**

Date: March 12, 2018  
No Oral Argument Unless Requested by  
the Court

Hon. M. James Lorenz

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## I. Introduction

This case concerns neither the substance nor the wisdom of the nation’s immigration policies, but whether the Defendants, Department of Homeland Security and Secretary of DHS Kristjen Nielsen (hereinafter referred to together as “DHS” or “Defendant”), can avoid their procedural obligations under the National Environmental Policy Act, 42 U.S.C. § 4331 *et. seq.* (“NEPA”). NEPA compliance is obligatory for all federal agencies. DHS maintains in its Memorandum in Support of Partial Motion to Dismiss Counts One and Two of the Amended Complaint at 1, ECF No. 47-1 (“Def. Memo”) that, in the Amended Complaint, Plaintiffs seek an “overhaul” of the nation’s immigration policies, which must be provided by legislative channels. DHS is mistaken. This lawsuit seeks only to compel DHS to comply with the informed decision procedures NEPA guarantees to the public.

Plaintiffs are individual environmentalists, environmental groups, southwest natural resource conservation groups, and members of the southwest cattle-ranching community. They bring this NEPA challenge in an effort to remedy DHS’s ongoing institutional failure to recognize that its actions regulating the entry and settlement of foreign nationals result in multiple environmental impacts. The heart of DHS’s failure is simple. Defendant has failed to recognize the obvious fact that migration, because it causes population growth and the relocation of masses of people into and within the country, impacts the environment. When DHS adopts and implements large-scale actions such as programs granting classes of foreign nationals the right to enter and settle in the United States, pursuant to either its statutory authority or executive directive, it is engaging in actions subject to NEPA.

Plaintiffs’ Amended Complaint extensively documents the important and quantifiable environmental impacts of immigration-induced population growth in an expert report prepared by Dr. Philip Cafaro, entitled “The Environmental Impact of Immigration into the United States.” (“Am Compl. Ex. 5”) ECF No. 44-6. Dr. Cafaro



documents many population growth effects from immigration, such as urban sprawl, loss of farmland, loss of habitat and biodiversity, increased greenhouse gas emissions, and increased water demand and withdrawal from natural systems. Plaintiffs' affidavits also document the extensive impacts of both immigration-related population growth and border crossing on their own communities and lands. Am. Compl. Exs. 6-18, ECF 44-7 to 44-19. NEPA requires that these impacts, as well as others, be reviewed and evaluated by DHS before it undertakes discretionary actions relating to the entry into and settlement of foreign nationals in the United States. But DHS has completely avoided any effort to comply with NEPA.

At first blush, what may make this case seem complicated (and what makes the Amended Complaint so "voluminous") is that the United States' immigration system *itself* is a *very* intricate regulatory scheme. DHS's reluctance to apply NEPA to its actions relating to the entry into and settlement of foreign nationals in the United States is perhaps understandable. But, as the D.C. Circuit said in one of the earliest cases involving agency obstruction over compliance with NEPA: the statute's language does not provide an "escape hatch for footdragging agencies; it does not make NEPA's procedural requirements somehow 'discretionary.' Congress did not intend the Act to be a paper tiger." *Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n*, 449 F. 2d 1109, 1114 (D.C. Cir. 1971).

Count I challenges DHS's final, published instruction manual establishing DHS's NEPA procedures (the "Instruction Manual"), attached to the Amended Complaint as Ex. 2. Am. Compl. Ex. 2, ECF 44-3. DHS acted arbitrarily and capriciously by failing to incorporate any framework of NEPA review for immigration-related actions into the Instruction Manual, despite their environmental impacts.

By contrast, Count II addresses the downstream legal consequences of DHS's original error in adopting binding NEPA procedures that arbitrarily and capriciously

1 ignore the environmental impacts of its immigration-related actions. Count II  
2 encompasses a host of environmentally significant final actions adopted without  
3 NEPA review. In only a handful does the agency even bother to reference NEPA  
4 with a citation to a categorical exclusion. Since NEPA became law in 1970, the  
5 entrance and settlement of tens of millions of foreign nationals in the country have  
6 been facilitated by the federal government. Their environmental effects *en masse*  
7 obviously have been significant. Yet DHS has never considered these effects, in  
8 violation of NEPA.

9 Today, there are eight discrete methods by which DHS sets conditions allowing  
10 foreign nationals to enter and stay in the country, or to stay after entry – seven  
11 authorized by statute, and one by executive directive. Under NEPA, the concerted  
12 actions DHS takes to implement each of these methods qualify as programs. All eight  
13 programs are currently ongoing without NEPA compliance. Because of the  
14 extraordinary complexity of the nation’s immigration programs (a complexity that is  
15 no fault of Plaintiffs), Plaintiffs’ Count II must be read to include the Amended  
16 Complaint’s Ex. 3, an expert report commissioned by Plaintiffs by immigration expert  
17 Jessica Vaughan. Am. Compl. Ex. 3, ECF No. 44-4. Ms. Vaughan identified as many  
18 of these concerted final actions as possible and found a total of 88 individual actions.  
19 Am. Compl. Ex. 3 at 109-26, ECF No. 44-4. The report is an essential part of Count  
20 II and explains the structure of each of these programs, what qualifies them as  
21 programs under NEPA, and (to the extent possible) the specific occasions when each  
22 one was adopted or substantively updated through discrete and final agency action.  
23 Most of these instances were final regulations codified in the CFR, but five of them  
24 were final and binding policy memoranda. At the time Plaintiffs filed their Amended  
25 Complaint, none of these actions had been finally revoked, though the ultimate fate of  
26 some was unclear. Though these 88 actions encapsulate a host of different types of  
27  
28

1 revisions to DHS's programs relating to the entry and settlement of foreign nationals,  
 2 *all* were undertaken without NEPA review.

## 3 II. Standard of Review

4 A Rule 12 (b)(6) motion "tests the legal sufficiency of a claim. A claim may be  
 5 dismissed only if it appears beyond doubt that the plaintiff can prove no set of facts in  
 6 support of his claim which would entitle him to relief." *Navarro v. Block*, 250 F.3d 729,  
 7 732 (9th Cir. 2001) (internal citation and quotation marks omitted). The appropriate  
 8 procedural vehicle by which to move to dismiss a violation of NEPA and the APA is  
 9 Rule 12(b)(6) rather than Rule 12(b)(1). Both NEPA and the Administrative  
 10 Procedures Act ("APA") "raise a federal question covered by 28 U.S.C. § 1331." *Nat.*  
 11 *Res. Def. Council, Inc. ("NRDC"). v. U.S. Dep't. of State*, 658 F. Supp. 2d 105, 108  
 12 (D.D.C. 2009). If "the crux of defendants' various arguments is not whether the  
 13 [agency] has presented federal claims, but whether those claims are enforceable  
 14 against the [agency]," then "the court must assume jurisdiction before deciding  
 15 whether a cause of action exists." *Id.* at 108-09.

16 The APA provides the only avenue for judicial review of agency action, and  
 17 there is a "strong presumption" that Congress intends such judicial review. *Helgeson v.*  
 18 *Bureau of Indian Affairs*, 153 F.3d 1000, 1003 (9th Cir.1998) (citations omitted).  
 19 Challenges under NEPA are therefore brought under the APA.

20 Congress enacted NEPA to "promote environmentally sensitive decision-  
 21 making" *Protect Our Cmty's. Found. v Chu*, No. 12-cv-3062 L, 2014 U.S. Dist. LEXIS  
 22 42410 at \*13 (Mar. 27, 2014) (quoting *Anderson v. Evans*, 314 F. 3d 1006, 1016 (9th Cir.  
 23 2002)). NEPA intends to guarantee that the "larger audience" that will play a role in  
 24 both the decision-making process itself and the implementation of the resulting  
 25 decisions will have access to all the relevant information. *Protect Our Cmty's. Found. v*  
 26 *Chu* at\*13 (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989)).  
 27 This larger audience includes not just the public, but "the President, who is  
 28

1 responsible for the agency’s policy, and Congress, which has authorized the agency’s  
 2 actions.” *Protect Our Cmty’s. Found. v Chu* at\*13 (citations omitted). The information  
 3 provided by NEPA “is critical for decision-makers who must ‘decide whether they  
 4 will support or overrule the agency’s action...” *Id.* (citations omitted).

### 5 III. Argument

#### 6 A. Count I

##### 7 1) The Instruction Manual is a final agency action subject to APA review.

9 Count I asserts that the Instruction Manual adopted by DHS to govern its  
 10 compliance with NEPA is arbitrary and capricious under the APA because it fails to  
 11 incorporate NEPA review into its actions relating to the entry into and settlement of  
 12 foreign nationals in the United States. Defendant argues that 5 U.S.C. § 704, which  
 13 limits review under the APA to final agency action, prevents judicial review of the  
 14 Instruction Manual. Def. Memo at 8. ECF No. 47-1. Defendant asserts that the  
 15 Instruction Manual fails the two-prong test set out in *Bennett v. Spear* for determining  
 16 whether an agency action is final and thus subject to judicial review under the APA.  
 17 520 U.S. 154, 177-78 (1997). The first prong is that an agency action must “mark the  
 18 consummation of the agency’s decisionmaking process.” The second prong requires  
 19 that the action must be “one by which rights or obligations have been determined, or  
 20 from which legal consequences will flow.” *Id.* Contrary to Defendant’s implication,  
 21 such consequences need not be to a “third party” but may be to the agency itself. Def.  
 22 Memo at 8, ECF No. 47-1. *See, e.g., Gen. Elec. Co. v. Evntl. Prot. Agency*, 290 F.3d 377,  
 23 382 (D.C. Cir. 2002) (explaining that the question of APA review turns on whether  
 24 “the agency action binds private parties or *the agency itself* with the force of law”) (citations omitted) (emphasis added). Defendant asserts that the Instruction Manual is  
 25 a “policy manual” and guide “for agency operations,” and as such, neither marks the  
 26 consummation of the agency’s decision making process nor constitutes an action by  
 27  
 28

1 which legal consequences flow. Def. Memo at 17, ECF No. 47-1. Defendant's  
 2 assertions are erroneous because the Instruction Manual is both final and of legal  
 3 import, as an examination of both its promulgation history and its content reveals.

4 **a) The Instruction Manual's promulgation history establishes that it is final**  
 5 **and binding on DHS.**

6 The Instruction Manual was not promulgated by DHS's choice—its history  
 7 shows that it was a response to congressional and executive mandate. Both NEPA  
 8 itself, 42 U.S.C. § 4332(B), and the Council on Environmental Quality ("CEQ"), the  
 9 division of the Executive Office of the President established by the statute to ensure  
 10 that federal agencies meet their requirements under NEPA, require each federal  
 11 agency to adopt internal NEPA procedures. 40 C.F.R. § 1507.3. *See Public Citizen v.*  
 12 *U.S. Dep't of Transp.*, 316 F.3d 1002, 1028 (9th Cir. 2003) ("Agencies are *required* to  
 13 develop guidelines as to which of their actions do or do not require the preparation of  
 14 an EA or an EIS") (emphasis added).<sup>1</sup>

15 DHS met its statutory obligation to adopt internal NEPA procedures through  
 16 its promulgation of the Instruction Manual in 2014, following public notice and  
 17 comment and review by CEQ. On Thursday, June 5, 2014, DHS provided a notice in  
 18 the Federal Register that it was submitting its draft NEPA procedures for the  
 19 purpose of soliciting comments from the public. National Environmental Policy Act  
 20 Implementing Procedures, 79 Fed. Reg. 32,563, 32,563 (June 5, 2014). After a notice  
 21 and comment period, DHS adopted its final policy and procedures for implementing  
 22

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23  
 24  
 25 <sup>1</sup> NEPA procedures do vary among the federal agencies. *See*, D. Mandelker, NEPA  
 26 Law and Litigation, § 2.11 at 34-39 (2017). Some agencies publish in the Code of  
 27 Federal Regulations, while others publish departmental manuals. For a list of agency  
 28 NEPA procedures, *see* Federal Agency NEPA Procedures, Office of NEPA Policy  
 and Compliance, [https://energy.gov/nepa/downloads/federal-agency-nepa-](https://energy.gov/nepa/downloads/federal-agency-nepa-procedures)  
 procedures (last visited Feb. 21, 2018)

1 the National Environmental Policy Act of 1969, and duly issued its “Notice of Final  
 2 National Environmental Policy Act Implementing Procedures” on November 26,  
 3 2014 (the “Notice”). Environmental Planning and Historic Preservation Program, 79  
 4 Fed. Reg. 70,538, 70,538 (Nov. 26, 2014). In its summary, DHS stated:

5       The purpose of this notice is to inform the public that the Department of  
 6 Homeland Security (DHS or the Department) is issuing the final update  
 7 to its policy and procedures for implementing the National  
 8 Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 *et seq.*), as  
 9 amended, and the Council on Environmental Quality (CEQ) regulations  
 10 for implementing the procedural provisions of NEPA (40 CFR parts  
 11 1500-1508). The Department’s NEPA procedures are contained in  
 Directive 023-01, Rev. 01 and Instruction Manual 023-01-001-01, Rev.  
 01, Implementation of the National Environmental Policy Act . . . .

12       In the Notice, DHS explained that the revised Instruction Manual is final and  
 13 intended to bind the agency: “the revised Instruction establishes the procedures for  
 14 ensuring [DHS’s compliance with NEPA] is implemented in an effective and efficient  
 15 manner.” *Id.* DHS emphasized that the revised procedures including the Instruction  
 16 Manual were the consummation of a long process:

17       DHS invested over three years in developing the proposed revision to its  
 18 NEPA procedures. The draft revised Directive and Instruction were  
 19 provided to CEQ in the fall of 2013 for review and discussion prior to the  
 20 June 5, 2014 publication for public comment. DHS provided its proposed  
 21 final revised Directive and Instruction to CEQ in early September 2014;  
 22 CEQ responded with a letter dated November 10, 2014 prior to this  
 23 publication of the final Directive and Instruction as required under 40  
 CFR 1507.3(a), indicating that the Department's revised procedures  
 conform to NEPA and the CEQ regulations.

24       *Id.* at 70,539.

25       The Notice definitively establishes that the Instruction Manual, along with the  
 26 Directive, marked the “consummation of the agency’s decisionmaking process,” and  
 27 thus meets the first prong of *Bennett*. *Id.* at 70,538.  
 28



1 **b) The Instruction Manual's content demonstrates its legal consequences.**

2 The Instruction Manual meets the second prong of *Bennett* because, by its own  
 3 language, legal consequences have flowed and continue to flow from its adoption.  
 4 The Instruction Manual “establishe[s] the policy and procedures DHS follows to  
 5 comply with [NEPA] and the [CEQ] Regulations for Implementing the Procedural  
 6 Provisions of NEPA (40 C.F.R. Parts 1500-1508). This Instruction Manual serves as  
 7 the DHS implementing procedures for NEPA.” Am. Compl. Ex. 2 at 19, ECF No.  
 8 44-3.  
 9

10 The adoption of the Instruction Manual has a profound, ongoing effect on  
 11 DHS's NEPA compliance. The Instruction Manual itself itemizes those DHS  
 12 activities that “normally” require preparation of an Environmental Assessment or  
 13 Programmatic Assessment, including: construction projects in environmentally  
 14 sensitive areas, projects that impact wetlands and federal waters, regulations for  
 15 activities that impact environmentally sensitive areas, security measures that involve  
 16 reduced public access, and new law enforcement activities with undetermined  
 17 environmental impacts. *Id.* at 45. The Instruction Manual specifies when  
 18 Supplemental Environmental Assessments are to be prepared, and when an  
 19 Environmental Impact Statement or Programmatic Environmental Impact Statement  
 20 is to be prepared. *Id.* at 45, 50-51. Significantly, the Instruction Manual lists those  
 21 DHS actions that are categorically excluded from NEPA review. *Id.* at 65-93. The  
 22 document itself states: “The requirements of this Instruction Manual apply to the  
 23 execution of all NEPA activities across DHS.” *Id.* at 19. The Instruction Manual says  
 24 nothing about immigration-related actions.

25 The Instruction Manual constitutes DHS's “definitive statement of the agency's  
 26 position” on implementing NEPA. *Or. Nat. Desert Ass'n v. U.S. Forest. Serv.*, 465 F.3d  
 27 977, 982 (9th Cir. 2006). As noted in the last paragraph, “[t]he requirements of this  
 28 Instruction Manual apply to the execution of all NEPA activities across DHS.” Am.

1 Compl. Ex. 2 at 19, ECF No. 44-3. Thus, “immediate compliance [with the  
 2 Instruction Manual] is expected.” *Or. Nat. Desert Ass’n*, 465 F.3d at 982 (quoting  
 3 *Industrial Customers of Nw. Utils v. Bonneville Power Admin.*, 408 F.3d 638, 646 (9th Cir.  
 4 2004). “[A] document styled as a ‘guidance document’ may amount to a final agency  
 5 action when it ‘reflect[s] a settled agency position which has legal consequences.’”  
 6 *Columbia Riverkeeper v. U.S. Coast Guard*, 761 F.3d 1084, 1095 (9th Cir. 2014) (quoting  
 7 *Appalachian Power Co. v. Env’tl Prot. Agency*, 208 F.3d 1015, 1023 (D.C. Cir. 2000). Since  
 8 its promulgation, “legal consequences” have flowed and continue to flow from the  
 9 Instruction Manual because it determines which DHS activities receive NEPA  
 10 analysis, the scope of NEPA analysis to be accorded each action, and which DHS  
 11 activities are automatically excluded from NEPA analysis.

12 Contrary to Defendants’ assertion, the designation, title, or label placed on an  
 13 agency document is not dispositive of whether it is subject to judicial review. The  
 14 Ninth Circuit has made clear that “[i]t is the effect of the action and not its label that  
 15 must be considered.” *Or. Nat. Desert Ass’n*, 465 F.3d at 985 (quoting *Abramowitz v.*  
 16 *Env’tl. Prot. Agency*, 832 F.2d 1071, 1075 (9th Cir. 1987)). “Under the APA, for  
 17 instance, even if the agency does not label its decision or action as final, it may be  
 18 reviewable if it ‘has the status of law or comparable legal force’ or if ‘immediate  
 19 compliance with its terms is expected.’” *Columbia Riverkeeper*, 761 F.3d at 1095  
 20 (citations omitted). A final agency action subject to the requirements of the APA  
 21 exists when the action has “‘direct and appreciable legal consequences.’” *Id.* (quoting  
 22 *Bennett*, 520 U.S. at 177-78).

23 **c) DHS relies on analogies to agency manuals that are factually inapposite.**

24 Two of the three cases DHS relies upon for its assertion that “[p]olicy  
 25 memoranda and guides for agency operations do not constitute reviewable final  
 26 agency action[]” are not relevant to analysis of the Instruction Manual because they do  
 27 not involve the APA. Defendant seems only to be citing them to establish the false  
 28



1 proposition that any agency document labeled a “manual” does not bind an agency.  
 2 *See* Def. Memo at 9, ECF No. 47-1 (citing *Schweiker v. Hansen*, 450 U.S. (1981) and  
 3 *Kugel v. United States*, 947 F.2d 1504 (D.C. Cir. 1991)). The one opinion that does  
 4 involve the APA, *Cement Kiln Recycling Coal. v. Envtl. Prot. Agency*, 493 F.3d 207, 226  
 5 (D.C. Cir. 2007), concerned a challenge to an EPA regulation and accompanying  
 6 guidance document addressing the burning of hazardous waste as fuel. The guidance  
 7 document was attacked “because it was not promulgated pursuant to the notice-and-  
 8 comment procedures of the APA.” *Id.* at 226. Such is obviously not the case with the  
 9 Instruction Manual. Further, in contrast to DHS’s Instruction Manual, which declares  
 10 that “[t]he requirements of this Instruction Manual apply to the execution of all  
 11 NEPA activities across DHS[]” Am. Compl. Ex. 2 at 19, ECF No. 44-3, the guidance  
 12 document in *Cement Kiln* specifically declared that “this guidance does not impose  
 13 legally binding requirements on EPA...” 493 F.3d at 227. The plain language of the  
 14 Instruction Manual shows that it is intended to have the “force of law.” *Cement Kiln’s*  
 15 contested document is thus clearly distinguishable from the instant Instruction  
 16 Manual, which is binding and does command compliance by DHS and is, accordingly,  
 17 subject to judicial review under the APA.

## 18 **2) The Instruction Manual qualifies as a Rule under the APA.**

19  
 20 Secondly, Defendant erroneously claims that the Instruction Manual, which  
 21 clearly is the “whole or part of an agency statement of general or particular  
 22 applicability and future effect designed to implement, interpret, or prescribe law or  
 23 policy,” does not qualify as a rule under 5 U.S.C. 551(4) because it is merely a  
 24 document establishing “internal guidelines.” Def. Memo at 9, ECF No. 47-1. When  
 25 an agency argues that an action does not qualify as a rule under the APA because it is  
 26 labelled a guidance document, though courts might consider “the Agency’s own  
 27 characterization of its action” and “whether the action was published in the Federal  
 28 Register or the Code of Federal Regulations,” the “ultimate focus of the [court’s]

inquiry” is “whether the action has binding effects on third parties or on the agency.” *Gen. Elec. Co.*, 290 F. 3d at 382 (internal quotations and citations omitted). It is the third factor that demonstrates “whether the agency action partakes of the fundamental characteristic of a regulation, i.e., that it has the force of law.” *Id.* (quoting *MolyCorp, Inc. v. Env’t. Prot. Agency*, 197 F.3d 543, 545 (D.C. Cir. 1999)). DHS’s characterization of the Instruction Manual as merely guidance and not a rule is particularly unavailing here. The Instruction Manual *was* promulgated with notice and comment, and is binding not only on its face, but also because DHS received permission from another entity (CEQ) to implement it in its final form.

**a) The Instruction Manual was promulgated with Notice and Comment.**

As discussed *supra*, the Instruction Manual was promulgated pursuant to both NEPA 42 U.S.C. § 4332(B) and CEQ 40 C.F.R. § 1507.3 in accordance with the APA notice and comment requirements set forth in 5 U.S.C. § 553(c). A procedure, protocol, regulation, or other rule promulgated pursuant to the notice and comment requirements set forth in the APA is indisputably subject to judicial review under the APA. The APA’s applicability adheres upon a rule’s announcement in the Federal Register, because even the announcement itself is subject to judicial review under the APA:

The “basis and purpose” statement required by Section 4(c) of the APA must be sufficiently detailed and informative to allow a searching judicial scrutiny of how and why the regulations were actually adopted. In particular, the statement must advert to administrative determinations of a factual sort to the extent required for a reviewing court to satisfy itself that none of the regulatory provisions were framed in an “arbitrary” or “capricious” manner.

*Amoco Oil Co. v. Env’t. Prot. Agency*, 501 F.2d 722, 739 (D.C. Cir. 1974) (citations omitted). Defendant ignores the promulgation history of the Instruction Manual, which clearly reveals that DHS followed the APA’s basic notice and comment

1 parameters while drafting and publishing it. The Instruction Manual's promulgation  
2 history thus establishes that it is subject to the APA.

3 Defendant's claim that the Instructional Manual itself was not published in the  
4 Code of Federal Regulations is not dispositive of this issue. Def. Memo at 12-13, ECF  
5 No. 47-1. As discussed *supra*, the manner in which agencies publish their  
6 implementing NEPA procedures varies from agency to agency, some publishing in  
7 the Code of Federal Regulations and some "simply publish[ing] in the Federal  
8 Register, without codifying the provisions in the Code." D. Mandelker, *NEPA Law*  
9 *and Litigation* § 2:11 at 34 (2017). Agencies also commonly "supplement" codification  
10 or publishing in the Federal Register "with the issuance of an agency manual or  
11 handbook also containing the applicable NEPA requirements," as DHS has done. *Id.*  
12 DHS even pushed back in the Notice on the idea that the procedure it followed was  
13 somehow inadequate in making the adoption of the Instruction Manual a public  
14 action. "Federal Register and www.regulations.gov," DHS claimed in the Notice, "are  
15 widely recognized as appropriate sources for the public to learn about and comment  
16 on Federal government initiatives." Environmental Planning and Historic  
17 Preservation Program, 79 Fed. Reg. at 70,538.

18 **b) The Instruction Manual has the "force of law."**

19 Whether an agency action has the "force of law," and is deemed binding on the  
20 agency, is an even more important factor in determining whether it qualifies as a rule.  
21 *See Gen. Elec. Co.*, 290 F.3d at 382. This factor decidedly favors Plaintiffs. As discussed  
22 *supra*, the Instruction Manual is binding on DHS on its face. The document itself  
23 states: "The requirements of this Instruction Manual apply to the execution of all  
24 NEPA activities across DHS." Am. Compl. Ex. 2 at 19, ECF No. 44-3. Not only does  
25 the document itself state that it is binding, but DHS has no choice whether or not to  
26 treat it as binding. DHS was required to submit it to CEQ for approval. That DHS  
27 did not choose to codify it in the Code of Federal Regulations is immaterial. Agencies  
28

1 that chose to codify their NEPA procedures as regulations are not more subject to  
 2 NEPA than agencies that do not. NEPA applies to all federal agencies. DHS stated  
 3 the Notice that CEQ agreed that “the Department's revised procedures [including the  
 4 Instruction Manual] conform to NEPA and the CEQ regulations.” Environmental  
 5 Planning and Historic Preservation Program, Fed. Reg. at 70,539.

6 Having received permission from CEQ to use its published NEPA procedures,  
 7 DHS cannot then deviate from them. Because DHS drafted its internal NEPA  
 8 procedures pursuant to its statutory and regulatory obligation to follow CEQ’s  
 9 directives, the Instruction Manual is not akin to internal guidance documents adopted  
 10 pursuant to no law or executive directive. It is, of course, possible that, unbeknownst  
 11 to Plaintiffs, DHS does not in practice follow its own Instruction Manual. But, if that  
 12 is the case, that itself is a violation of NEPA. DHS cannot use its flouting of its  
 13 obligations under NEPA as a shield to prevent judicial review.

14 Furthermore, there is no hint within the Instruction Manual that DHS does not  
 15 intend that it have a binding effect on its regulatory practices. The Instruction Manual  
 16 qualifies as interpretive rule subject to judicial review under the APA because it  
 17 “‘spells out a duty fairly encompassed within the regulation that the interpretation  
 18 purports to construe.’” *Def. of Wildlife v. Tuggle*, 607 F. Supp. 2d 1095, 1115 (D. Ariz.  
 19 2009) (quoting *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 588 (D.C.  
 20 Cir. 1997)). The Instruction Manual “spells out” DHS’s “duty” to comply with NEPA  
 21 and the CEQ NEPA regulations. The *Tuggle* court noted that though an interpretive  
 22 rule “lacks the formal force of law, as a practical matter it affects the regulatory  
 23 practices of an agency... as to what a law or regulation means and how it will be  
 24 enforced.” *Tuggle*, 607 F. Supp. 2d at 1115. Therefore, “[w]hen it has a substantial  
 25 impact on the rights of individuals, its promulgation may constitute final agency  
 26 action for purposes of judicial review. *Id.* (citing *Am. Postal Workers Union v. U.S. Postal*  
 27 *Srv.*, 707 F.2d 548, 560 (D.C. Cir. 1983); *National Home Builders v. Norton*, 415 F.3d 8,  
 28

15 (D.C. Cir. 2005). While the action in *Tuggle* concerned procedures for endangered wolf removals, the Instruction Manual governs how DHS implements NEPA. In *Tuggle*, the U.S. Fish and Wildlife Service was statutorily obliged to implement binding “wolf management procedures and protocols” to deal with wolf removal actions. *Id.* The documents created did so with specificity and finality. Such is the case at bar. DHS is statutorily obligated to draft and publish internal NEPA procedures. In response, DHS produced the Instruction Manual, a 91-page document setting forth detailed, binding instructions that govern DHS’s daily compliance with NEPA.

## **B) Count II**

### **1) Plaintiffs have identified eight distinct programs subject to NEPA.**

In Count II, Plaintiffs assert that DHS failed to engage in any NEPA review in connection with eight programs it administers. Each of these eight programs, seven established by the Immigration and Nationality Act (“INA”), Pub. L. No. 82-414, 66 Stat. 163 (1952) and one via Executive Directive, governs a different, discrete category of DHS’s general statutory authority to regulate the entry into and settlement of foreign nationals in the United States. That is, each program establishes its own discrete policy goal of setting criteria for entry into or settlement of classes of foreign nationals in the country, and each is further codified by a series of regulations found in specific sections of the Code of Federal Regulations. The regulations and policy memoranda that implement each program are compiled and exhaustively detailed in Ex. 3 of the Amended Complaint by immigration expert Jessica Vaughan. Am. Compl. Ex 3, ECF No 44-4.

Under NEPA these eight categories of DHS authority constitute “programs.” A program is defined as “a group of concerted actions to implement a specific policy or plan; systematic and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive.” 40 C.F.R. § 1508.18(b)(3). The eight programs at issue in this case are: employment based

1 immigration, family based immigration, long term nonimmigrant visas, parole,  
 2 Temporary Protective Status, refugees, asylum, and Deferred Action for Childhood  
 3 Arrivals. These programs, individually and collectively, have a significant cumulative  
 4 impact on population growth in the United States and particularly in California,<sup>2</sup> the  
 5 state where many Plaintiffs reside. Yet these programs have never received even  
 6 cursory NEPA compliance by DHS.

7 CEQ has developed regulations for determining whether concerted agency  
 8 activities qualify as a major federal action under NEPA. *Found. on Econ. Trends v. L yng*,  
 9 817 F. 2d 882, 884 (D.C. Cir. 1987). Among the actions subject to NEPA listed by the  
 10 CEQ are the “[a]doption of programs, such as a group of concerted actions to  
 11 implement a specific policy or plan; systematic and connected agency decisions  
 12 allocating agency resources to implement a specific statutory program or executive  
 13 directive.” 40 C.F.R. § 1508.18(b)(3). A programmatic environmental impact  
 14 statement (“PEIS”) is utilized “where there are sufficiently ‘related’ actions [that] will  
 15 have ‘cumulative or synergistic environmental impact.’” *L yng*, 817 F.2d at 885, quoting  
 16 *Kleppe v. Sierra Club*, 427 U.S. 390, 408-15 (1976). *See also*, *Sierra Club v. Watkins*, 808 F.  
 17 Supp. 852, 863 (D.D.C. 1991) (reasoning that programmatic review is proper under  
 18 NEPA when a related series of actions have cumulative effects); *Friends of the Earth*,  
 19 *Inc. v. Mosbacher*, 488 F. Supp. 2d 889, 911 (N.D. Cal 2007) (finding that “concerted or  
 20 connected” actions properly receive programmatic analysis).

21  
 22 Broadness of an action per se is no bar to compliance with NEPA: the CEQ  
 23 regulations state that environmental impact statements are “sometimes required for  
 24 broad Federal actions such as the adoption of new agency programs or regulations.”

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25  
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 27 <sup>2</sup> See “The Environmental Impact of Immigration into the United States,” by Dr.  
 28 Cafaro. (“Am Compl. Ex. 5”) ECF No. 44-6.



1 40 CFR § 1502.4 (b). CEQ promulgated a “Guidance for Effective Use of  
 2 Programmatic NEPA Reviews” on December 23, 2014, in which it stated that “the  
 3 analyses in a programmatic NEPA review are valuable in setting out the broad view of  
 4 environmental impacts and benefits for a proposed decision such as a rulemaking, or  
 5 establishing a policy, program, or plan.” Final Guidance for Effective Use of  
 6 Programmatic NEPA Reviews, Fed. Reg. 76,986, 76,986 (Dec. 23, 2014). CEQ also  
 7 explains how programmatic reviews provide an opportunity to engage the public in  
 8 federal decision making, a “key policy goal of NEPA and the CEQ regulations,” and  
 9 encourages agencies to support “early public participation.” *Id.* at 76,989. DHS’s own  
 10 NEPA guidelines mirror the CEQ’s. The Instruction Manual states, under the  
 11 subheading Programmatic EAs, that “[a] component may prepare a Programmatic EA  
 12 (PEA), for a broad Federal action, *such as a program*, plan, or actions of a similar type  
 13 ...” Am. Compl. Ex. 2 at 45, ECF No. 44-3 (emphasis added).

14 All programs, whether large or small, are subject to NEPA compliance.  
 15 “NEPA compliance is required even if the challenged actions are part of a broad  
 16 program.” *Friends of the River v. U.S. Army Corps of Eng’rs*, 870 F. Supp. 2d 966, 978  
 17 (E.D. Cal. 2012). Claims under NEPA are proper if the plaintiff challenges  
 18 “identifiable, final agency actions within the APA.” *Id.* “NEPA requires *some* type of  
 19 procedural due diligence – even in cases involving broad, programmatic changes.”  
 20 *Citizens for Better Forestry v. U.S. Dep’t. of Agric.*, 481 F. Supp. 2d 1059, 1085 (N.D. Cal.  
 21 2007) This quotation summarizes the heart of Plaintiffs’ argument: DHS has engaged  
 22 in zero NEPA compliance with respect to the actions at bar.

23 **2) DHS’s arguments ignore the detailed specificity of the programs set forth in**  
 24 **the Amended Complaint.**

25 Defendant argues that Count II must be dismissed because Plaintiffs have not  
 26 identified discrete programs or any discrete actions in their complaint, making the  
 27 challenge an impermissible broad attack on all of DHS’ statutory authority. See Def  
 28

1 Memo at 15, ECF 47-1. Defendant claims that therefore the Court must get involved  
 2 in DHS's day-to-day operations in order to review Count II. *Id.* Defendant also argues  
 3 that agencies have discretion over whether to use programmatic environmental impact  
 4 statements (PEISs) in their NEPA compliance, and so Plaintiffs cannot force DHS to  
 5 prepare one. *Id.* at 15-16.<sup>3</sup>

6 **a) Defendant relies on *Lujan* and *Norton*, but they are not applicable.**

7 DHS relies on *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871 (1990) and *Norton v. S.*  
 8 *Utah Wilderness All.*, 542, U.S. 55 (2004) in support of its argument that Plaintiffs have  
 9 failed to cite specific actions subject to NEPA review because "the APA does not  
 10 authorize suits seeking 'wholesale improvement of [an agency] program by court  
 11 decree'" Def. Memo at 13, ECF No. 47-1 (quoting both *Lujan* and *Norton*). DHS  
 12 states that "Plaintiffs merely list the statutes that provide the parameters for DHS'  
 13 operation; they fail to identify any discrete, final agency action on the part of the  
 14 agency, and their claim fails." Def. Memo at 15, ECF No. 47-1. Defendant's assertion  
 15 is patently false: the seven programs arising from the cited statutory authority,  
 16 together with 86 specific regulations and policy memoranda that comprise the  
 17 statutory programs, are in fact detailed comprehensively in Ex. 3 to the Amended  
 18 Complaint, which is never acknowledged or recognized in Defendant's memorandum.  
 19 *See* Am. Compl. Ex. 3, ECF No. 44-4. The body of the Amended Complaint refers to  
 20 Ex. 3 on eight separate pages. Am. Compl. at 6, 47, 49-51, and 53-55. ECF 44.

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26 <sup>3</sup> Defendant also erroneously states that Count II fails to state a claim under 5 U.S.C.  
 27 § 706(1). Plaintiffs' claim asserts that DHS acted in an arbitrary and capricious  
 28 fashion, in violation of 5 U.S.C. § 706(2)(A) for failing to undertake any NEPA  
 compliance with respect to its programs governing the entry and settlement of foreign  
 nationals into the U.S.



1 In *Lujan* and *Norton*, the Supreme Court rejected broad policy challenges to the  
 2 entire way agencies carry out their statutory mandate because the plaintiffs failed to  
 3 allege specific agency actions subject to NEPA. The challenges did not “refer to a  
 4 single [agency] order or regulation, or even to a completed universe of particular  
 5 [agency] orders and regulations.” *Lujan*, 497 U.S. at 890. If a plaintiff fails to specify  
 6 particular and discrete actions that were carried out in violation of the law, then the  
 7 plaintiff must be seeking “wholesale improvement” of a program by court decree,  
 8 which a court is not empowered to perform. *Id.* at 891. A court cannot permit a  
 9 “generic challenge to all aspects of a program” *Id.* at 890. A court also cannot  
 10 supervise the substance of the agency’s compliance with a broad statutory mandate  
 11 because to do so would be to “inject the judge into day-to-day agency management.”  
 12 *Norton*, 542 U.S. at 66-67.

13 Such is clearly not the case at bar.

14 **b) Count II is a viable challenge because it specifically identifies discrete**  
 15 **agency actions that violated NEPA for a single reason.**

16 For each of the eight programs at issue, Plaintiffs have identified (to the extent  
 17 reasonably possible) and listed the particular group of specific, discrete, and concerted  
 18 actions DHS has taken to implement each discrete policy goal of setting conditions  
 19 for granting eligibility to classes of foreign nationals to enter and/or remain in the  
 20 United States. A meticulous description of each program and a list of the specific  
 21 actions taken by DHS to implement each one is located in Ex. 3. Am. Compl. Ex. 3 at  
 22 106-26, ECF No. 44-4. For each program, Plaintiffs first identify the initial regulation  
 23 adopting the program pursuant to statutory authority (or in the case of DACA,  
 24 identify the date of the executive directive) and then list the updating regulations, or in  
 25 some cases, binding policy memoranda.  
 26  
 27  
 28

1 The first program is employment based immigration, authorized in 1990,  
 2 concerning the “specific policy plan”<sup>4</sup> of admitting foreign nationals based on U.S.  
 3 employment needs. This program gives rise to five categories of immigrant visas. The  
 4 regulations implementing it are found in 8 C.F.R. §§ 204.5, 204.6. Exhibit 3 of the  
 5 Amended Complaint identifies five “concerted actions” DHS took in implementing,  
 6 creating, and refining the petition process through regulation between 1991 and 2016.  
 7 Am. Compl. Ex. 3 at 109-110, ECF No. 44-4. Approximately 3.3 million foreign  
 8 nationals have settled in the country through this program. *Id.* at 110.

9 The second program is family based immigration, authorized (in current form)  
 10 in 1990, concerning the specific policy plan of admitting foreign nationals based on  
 11 family ties to American citizens. The program gives rise to nine immigrant visa  
 12 categories. Regulations implementing it are found in 8 C.F.R. §§ 201.1, 204.2. Exhibit  
 13 3 of the Amended Complaint identifies nine “concerted actions” DHS took in  
 14 implementing this program between 1992 and 2016. Am. Compl. Ex. 3 at 111-112.  
 15 ECF No. 44-4. Approximately 14.6 million foreign nationals have settled in the  
 16 country through this program. *Id.* at 112.

17 The third program is the long-term Nonimmigrant Visa Program, authorized in  
 18 1990. The program gives rise to eight long-term nonimmigrant visa categories (as well  
 19 as a host of short term nonimmigrant visa categories that Plaintiffs are not challenging  
 20 under NEPA in this case). Regulations implementing it are found in 8 C.F.R. §§  
 21 214.1-4, 214.12-14. Exhibit 3 of the Amended Complaint identifies 47 “concerted  
 22 actions” DHS undertook in implementing this program between 1994 and 2017  
 23 through regulation or policy memoranda. Am. Compl. Ex. 3 at 114-117, ECF No. 44-  
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 28 <sup>4</sup> 40 C.F.R. 1508.18(b)(3) specifies that a program is a group of “concerted actions” to  
 implement a “specific policy plan.”

1 4. Approximately 12.2 million foreign nationals have settled in the country through  
2 this program. *Id.* at 117.

3 The fourth program is parole, authorized in its current form in 1996,  
4 concerning the specific policy plan of allowing foreign nationals to enter the country  
5 without a visa for urgent humanitarian reasons or significant public benefit.  
6 Regulations implementing parole are found in 8 C.F.R. § 212.5. Exhibit 3 identifies 12  
7 “concerted actions” DHS undertook in implementing the program by regulation or  
8 policy memoranda between 1982 and 2017. Am. Compl. Ex. 3 at 117-120, ECF No.  
9 44-4. Approximately 100,000 foreign nationals have entered into or settled in the  
10 country through this program. *Id.* at 120.

11 The fifth program is Temporary Protected Status, authorized in 1990,  
12 concerning the specific policy plan of allowing foreign nationals in the United States  
13 without a valid visa to remain because of a natural disaster or civil violence in their  
14 nation of origin. Regulations implementing this program are found in 8 C.F.R. §§  
15 244.1-19. Exhibit 3 of the Amended Complaint identifies nine “concerted actions”  
16 DHS undertook in implementing this program by regulation between 1991 and 2011.  
17 Am. Compl. Ex. 3 at 121-122, ECF No. 44-4. Approximately 377,000 foreign  
18 nationals have settled in the country through this program. *Id.* at 122.

19 The sixth program is refugees, authorized in its current form in 1980,  
20 concerning the specific policy plan of admitting foreign nationals subject to  
21 persecution at home. Regulations implementing the refugee program are found in 8  
22 C.F.R. §§ 207.1-9, 209. Exhibit 3 of the Amended Complaint identifies eight  
23 “concerted actions” DHS undertook in implementing this program by regulation  
24 between 1981 and 2011. Am Compl. Ex. 3 at 122-123, ECF 44-4. Approximately 2.2  
25 million foreign nationals have settled in the country through this program. *Id.* at 123.

26 The seventh program is asylum, authorized in 1980, concerning the specific  
27 policy plan of allowing foreign nationals in the United States to stay because of  
28

1 persecution at home. Regulations implementing asylum are found in 8 C.F.R. §§  
2 208.1-23, 209. Exhibit 3 of the Amended Complaint identifies 14 “concerted actions”  
3 DHS undertook in implementing this program by regulation between 1981 and 2012.  
4 Am. Compl. Ex. 3 at 123-124, ECF. No. 44-4. Approximately 790,000 foreign  
5 nationals have settled in the country through this program. *Id.* at 125.

6 The eighth program is DACA, authorized by executive directive in 2012,  
7 concerning the specific policy plan of allowing foreign nationals to stay in United  
8 States based on their age at entrance. Exhibit 3 of the Amended Complaint identifies  
9 the two “concerted actions” in implementing the program by policy memoranda. Am.  
10 Compl. Ex. 3 at 125-126, ECF. No. 44-4. Approximately 793,000 foreign nationals  
11 have settled in the country through this program. *Id.* at 126.

12 The CEQ’s definition of a program thus justifies defining each specific area of  
13 statutory authority, together with its implementing regulations, as a single program.  
14 DHS could argue that organizing them as single programs is arbitrary, and that they  
15 are properly seen as more than eight programs. For instance, one might say that the  
16 regulations concerning long term nonimmigrant visas do not comprise a single  
17 program because they authorize many different visa programs, such as the Student  
18 and Exchange Visitor Program and the H-1B visa programs. Such semantics,  
19 however, matter very little in terms of DHS’s failure to conduct *any* NEPA analysis of  
20 them. DHS did no NEPA analysis of any of the environmental effects resulting from  
21 the introduction of very large numbers of people into the country at any level.

22 These eight programs have “cumulative” and “synergistic” impacts because  
23 they produce similar environmental impacts from ongoing population growth in  
24 specific areas of the United States and the movement of large numbers of foreign  
25 nationals into and within the country, particularly in the southwestern states and  
26 Florida – the states where Plaintiffs’ affiants reside. *See Lyng*, 817 F. 2d at 885. As set  
27 forth in their affidavits, the affiants have experienced profound environmental  
28

1 impacts resulting from ongoing, large-scale migration of foreign nationals into their  
 2 communities, which has been induced by these DHS programs. *See* Am. Compl. Ex.  
 3 6-18, ECF Doc. 44-7 to 19. Because DHS adopted interrelated programs with  
 4 cumulative environmental impacts impacting the members of the Plaintiff  
 5 organizations, the manner in which these DHS programs are labeled should not be  
 6 dispositive of whether DHS can completely evade NEPA compliance with respect to  
 7 its actions governing the entry and settlement of foreign nationals.

8 **c) DHSs’ “framework” is a set of related programs by another name, and**  
 9 **NEPA *does* intend review whenever the environment is significantly affected.**

10 Defendant argues that its immigration-related actions are not programs but a  
 11 “Congressionally mandated framework under which DHS operates.” Def. Memo at  
 12 15, ECF No. 47-1. As such, Defendant argues that Count II must be dismissed  
 13 because it requires “general judicial review of an agency’s day-to-day-operations,”  
 14 which the Supreme Court in *Lujan* has precluded. Defendant is mistaken. Plaintiffs  
 15 merely seek compliance with NEPA. The reality is that this congressionally-mandated  
 16 framework established under the authority of a statute *is* the same as a program. Such a  
 17 framework creates “a group of concerted actions to implement a specific policy or  
 18 plan; systematic and connected agency decisions allocating agency resources to  
 19 implement a specific statutory program or executive directive.” Plaintiffs have indeed  
 20 identified those specific concerted actions and systematic and connected agency  
 21 decisions that are subject to NEPA compliance. Unlike the plaintiffs in *Lujan*,  
 22 Plaintiffs here have taken the trouble to identify the “completed universe of particular  
 23 [agency] orders and regulations” that make up these programs. 497 U.S. at 890.

24 Of course, Plaintiffs could have, in the alternative, listed all 88 actions  
 25 separately in the Amended Complaint as individual violations of NEPA. But to do so  
 26 would not only have rendered the complaint *less* manageable, it would also have meant  
 27 that the interconnectedness of each group of actions that implement a particular grant  
 28

1 of statutory authority (many actions, in fact, implemented more than one grant of  
 2 statutory authority), and how they actually constitute discrete programs, would have  
 3 been *less* apparent. Defendant would have then likely complained that Plaintiffs had  
 4 cited a host of random actions that had nothing to do with each other. That such a  
 5 situation should be avoided is precisely what the Ninth Circuit meant when it  
 6 reasoned that NEPA is not subject to the “tyranny of small decisions.” *Kern v. U.S.*  
 7 *Bureau of Land Mgmt.*, 284 F.3d 1062, 1078 (9th Cir. 2002).

8        Nothing in the Amended Complaint requires that the Court inject itself into  
 9 the decision-making process of the agency’s day-to-day operations that relate to  
 10 immigration. The immigration scheme of the United States is very complicated, and  
 11 injecting informed environmental decision-making into the decisions that carry it out  
 12 may seem daunting to DHS. However, injecting environmental awareness into this  
 13 agency’s decision making is no more daunting than the task *any* agency faces in  
 14 applying NEPA. The complexity of the task presented by the law is *precisely* why the  
 15 CEQ *mandated* in 1978 that all agency specifically adopt NEPA procedures to guide  
 16 them. 40 C.F.R. § 1500 *et seq.* Thus, if the agency’s NEPA guidelines themselves  
 17 arbitrarily and capriciously fail to notice a large part of the agency’s mandate, the  
 18 agency can expect the consequences of this failure to be felt in broad areas.

19        In this case, if this Court were to order proper compliance with the Instruction  
 20 Manual, such an order would in no way “inject” the court “into day-to-day agency  
 21 management.” Ignoring the environmental impacts of immigration is arbitrary and  
 22 capricious, but if DHS were to reissue its NEPA regulations without this error and  
 23 then properly apply that guidance, it would then be in compliance with NEPA. If this  
 24 Court ordered NEPA compliance, it would in no way rob DHS of its discretion in  
 25 carrying its NEPA procedures out, nor in carrying out its duties to implement  
 26 immigration law. NEPA’s mandate is strictly procedural. DHS needs to fix its NEPA  
 27 procedure, not its actions.  
 28



1 **d) Plaintiffs seek *some* form of NEPA review, not necessarily a PEIS.**

2 Defendants rely on *Kleppe v. Sierra Club* for the proposition that the decision to  
 3 prepare a PEIS rests within its discretion. 427 U.S. 390, 412 (1976). ” Def. Memo at  
 4 15, ECF No. 47-1. Defendant overlooks the fact that the Amended Complaint does  
 5 not seek a Court order compelling DHS to specifically prepare a PEIS. Rather,  
 6 Plaintiffs seek to compel DHS to initiate *some* form of NEPA review. Only upon  
 7 initiating NEPA compliance, will DHS be in a position to assess the appropriate  
 8 scope of its NEPA review regarding these programs.<sup>5</sup>

9 **C. DACA**

10 Finally, DHS asserts that the DACA program is exempt from NEPA as “a  
 11 judicial or administrative civil or criminal enforcement action.” Def. Memo at 17.  
 12 Such an exemption would indeed apply if Plaintiffs were challenging a particular  
 13 decision to grant an individual status under DACA. But Plaintiffs are only challenging  
 14 the adoption of the program itself without NEPA review. Like the seven statutory  
 15 programs, DACA grants permission to stay in the country for certain amounts of time  
 16 and under specific conditions to classes of individuals based on certain criteria.  
 17 DACA therefore also meets the definition of a program under the CEQ guidelines:  
 18 “concerted actions to implement a specific policy or plan; systematic and connected  
 19 agency decisions allocating agency resources to implement a specific statutory  
 20 program or *executive directive*.” (emphasis added).

21  
 22 Courts that have reviewed DACA have not disputed the “programmatic  
 23 nature” of this federal action. *See, e.g., Regents of the Univ. of Cal. v. United States, Dep’t. of*

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24  
 25  
 26 <sup>5</sup> The proper scope of environmental review and the decision whether to prepare a  
 27 PEIS are then “initially” committed to agency discretion, and thus reviewed according  
 28 to the “rule of reason.” *National Wildlife Federation v. Appalachian Regional Com.*, 677  
 F.2d 883, 888-889 (D.C. Cir. 1981)

1 *Homeland Sec.*, No. C 17-05211, 2018 U.S. Dist. LEXIS 4036 (Jan. 9, 2018)  
 2 (“Programmatic deferred action has been in use since at least 1997, and other forms  
 3 of programmatic discretionary relief date back to at least 1956.”). Therefore, DACA is  
 4 reviewable under NEPA for the same reasons the other programs are reviewable  
 5 under NEPA, as specified *supra*. Under NEPA, it is immaterial whether the program  
 6 is adopted pursuant to statute or executive directive.

## 7 **V. Conclusion**

8 Both Counts I and II validly challenge agency actions under NEPA and the  
 9 APA and therefore survive Defendant’s Motion to Dismiss.

10  
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Respectfully submitted,

12 /s/Julie B. Axelrod

13 California Bar. No. 250165

14 Immigration Reform Law Institute

25 Massachusetts Ave, NW, Suite 335

15 Washington, D.C. 20001

16 Lesley Blackner

17 Admitted *Pro Hac Vice*

18 Florida Bar No. 654043

19 340 Royal Poinciana Way, Suite 317-377

20 Palm Beach, FL 33480

21 James P. Miller

22 California Bar No. 188266

23 Law Office of JP Miller Jr.

181 Rea Ave, Suite 101

24 El Cajon, CA 92020